No. 04-423

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHINA NORTH INDUSTRIES CORP.,
A Chinese entity a/k/a Norinco,

Petitioner,

v.

LILIAN S. ILETO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari review:

   - where the decision below involves only claims arising under California law, and gives rise to no Rule 10(a) ground for certiorari review;

   - where Petitioner itself removed the case from state court to federal court, and never sought certification of any state law questions to the California Supreme Court, but now claims that the Ninth Circuit's failure to certify those questions *sua sponte* is a ground for extraordinary relief;

   - where the judgment below is interlocutory and not final, and Petitioner fails to identify a single issue so fundamental to further conduct of the case that it merits this Court's extraordinary review now; and

   - where, reduced to its essence, and stripped of its rhetoric and tone of moral outrage, the Petition amounts to little more than Petitioner's claim that the Ninth Circuit's interpretation of California law, and of *Merrill v. Navegar*, 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370 (2001), was erroneous.

2. Whether state law tort claims seeking compensatory damages for personal injuries caused by the negligent or otherwise tortious distribution of a commercial product are barred by the dormant Commerce Clause.

PARTIES TO THE PROCEEDINGS BELOW

With respect to Respondents, the Petition incorrectly lists Joseph S. Ileto, deceased, as a party to these proceedings. The Petition also incorrectly identifies Nathan Lawrence Powers as appearing on behalf of a class of persons similarly situated. Respondents did not reallege their class allegations in the First Amended Complaint (*see* Pet. App. A, 6a-7a).

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STATEMENT OF THE CASE

I. Introduction

Reviewing de novo a judgment entered on an order granting Petitioner's motion to dismiss, the Ninth Circuit Court of Appeals addressed the following issues below:

(1) whether, under California law, a manufacturer who distributes its dangerous product in ways that negligently facilitate the product's availability to criminals owes a duty of care to third parties who are then injured through criminal use of the product;

(2) whether, under California law, a complaint states a claim in public nuisance, where it alleges that a firearms manufacturer engages in the foregoing conduct on a systematic and ongoing basis, thereby giving sustenance to an illegal firearms market;

(3) whether any California statute immunizes a firearms manufacturer from liability in the foregoing circumstances; and

(4) whether the dormant Commerce Clause immunizes manufacturers from liability in such circumstances.

As a federal court effectively sitting in diversity, the Ninth Circuit was bound, as to the negligence claims, by California's statutory declaration that "every person is responsible for injury occasioned to another by his want of ordinary care in the management of his property or person." Cal. Civ. Code § 1714(a). App. A, B. As the California Supreme Court has acknowledged, this statute sets forth a *civil* law, not a common law principle:

> This code section, which has been unchanged in our law since 1872, states a civil law and not a common law principle. . . . Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, *it is clear that in the absence of a statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Cal. Civ. Code,*

> *no such exception should be made unless clearly supported by public policy.*

Rowland v. Christian, 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 99-100 (1968) (emphasis added) (citations omitted); *see also Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 477, 110 Cal. Rptr. 2d 370, 379 (2001) ("we begin always with the command of . . . section 1714, subdivision (a)").

In California, then, the question is not whether or under what circumstances the common law supports imposition of a duty of care on a product manufacturer, but rather under what statutory or judicially created exception to section 1714(a), if any, a manufacturer is *excused* from liability for injuries that his negligent conduct is a substantial factor in causing. Correctly concluding that no California statute immunizes Petitioner against the mandate of section 1714(a) on the facts alleged in the complaint, the Ninth Circuit went on to consider, and reject, the proposition that clear public policy requires that Petitioner be excused from the duty of care imposed by section 1714(a). In short, the analysis conducted by the Ninth Circuit was the precise analysis mandated by the California Legislature.

Petitioner and the dissenting opinions below thus turn California law upside down when they assert that the Ninth Circuit engaged in "judicial activism" and violated federalism principles by creating a "new common law liability" in California. Whether a firearms manufacturer may be held liable in negligence because it owes a duty of care in how it distributes its firearms is a question that California has addressed, and answered affirmatively, not by common law *but by statute*. In applying section 1714(a), the Ninth Circuit was following legislatively enacted state law, not creating new common law. If anything, the alternative for which Petitioner clamors — that is, ignoring the state legislative mandate of Cal. Civ. Code § 1714(a) — would have constituted the true affront to federalism principles.

Meanwhile, a duty of ordinary care in how a manufacturer chooses to distribute its products is not a duty "to refrain from

the production, sale and distribution of a lawful non-defective product," as Petitioner urges. *See* Pet. at ii, 11. By so stating, Petitioner appears to assume that the distribution of firearms can only occur in the absence of ordinary care.

Equally unmeritorious is Petitioner's claim that the Ninth Circuit sat not as a court but a "superlegislature" in deciding that Respondents' complaint states a claim in public nuisance under California law. Preferring its own definition of public nuisance to that of the California Legislature, Petitioner incorrectly claims that under California law, public nuisance concerns only the use or condition of property, not products — a proposition for which Petition relies primarily on twelve words from a *private* nuisance case, quoted out of context. Pet. at 11.

The Ninth Circuit, by contrast, relied on the definition of public nuisance enunciated by the California Legislature. Under Cal. Civ. Code § 3479, a *nuisance* is:

> *Anything* which is injurious to health, including, but not limited to, the illegal sale of controlled substances, *or* is indecent or offensive to the sense, *or* an obstruction of the free use of property, so as to interfere with the comfortable enjoyment of life *or* property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Id. (emphasis added). App. D. Under California Cal. Civ. Code § 3480, a *public* nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons." App. E. The knowing provision of weapons to criminals and other persons who are legally incompetent to possess them easily satisfies the plain language of these definitions.

In short, as to both the negligence and the public nuisance claims, the Ninth Circuit's analysis was thoroughly grounded in California statutes, which themselves embody the public policies of the California Legislature. The Ninth Circuit painstakingly applied the controlling California Supreme Court

and intermediate appellate decisions interpreting those statutes. Because Petitioner does not agree with the public policies of the California Legislature, Petitioner ignores them. Had the Ninth Circuit done so, it *would* have been acting as a superlegislature. Instead, it fulfilled its proper role as a federal court sitting in diversity, as it was required to do after Petitioner removed this case from state court.

II. Factual Background

This Petition arises out of an interlocutory judgment by the Ninth Circuit, reversing a trial court judgment entered on an order dismissing Respondents' first amended complaint ("FAC") for failure to state a claim. In brief, the FAC alleges that Petitioner Norinco knowingly and intentionally engages in marketing and distribution practices designed to supply its firearms to criminals and other persons who are prohibited by law from purchasing and possessing them, including mentally unstable individuals. Record 9, ¶ 1. Further, the FAC alleges that as a result of these practices, Buford Furrow, an avowed neo-Nazi with a history of mental instability and a felony conviction, obtained and possessed an illegally shortened Norinco model 320, 9 mm rifle ("Norinco 320") in addition to six other firearms. Record 13, ¶ 23. The FAC also alleges that on August 10, 1999, Furrow injured and terrorized the minor plaintiffs in an assault on them at their summer camp at the Jewish Community Center in Granada Hills, California ("JCC"), Record 14, ¶¶ 24-25, and later that day murdered Joseph Ileto, a U.S. Postal worker of Filipino descent, whom he shot with a Glock 26 handgun. Record 39, ¶ 148.

The FAC alleges that 9mm casings were found at both locations, and that the Norinco 320 and the Glock 26 are the only 9mm weapons Furrow possessed during the shootings. Record 14, ¶ 27; Pet. App. A, 6a n.5. Accordingly, Petitioner is incorrect in its statement that Respondents did not allege any causal link between the Norinco 320 and Respondents' injuries. (*Compare* FAC ¶ 27, found at Record 14, *with* Pet. at 4.) Likewise, Petitioner's description of Furrow's assaults as "random and unexpected" is not supported by the record below.

As pled in the FAC, Norinco deliberately engages in various distribution practices (which include, but are not limited to, oversupply of the legal market) with the intent of supplying prohibited persons such as Furrow with their products. Record 15, ¶ 31. These individuals — convicted felons, mentally unstable persons, juveniles, and others — are prohibited by law from purchasing and possessing firearms precisely because the law presumes they cannot be trusted to act *responsibly and predictably* with them. Pet. App. A 270. In other words, in the eyes of the lawmakers, it is so foreseeable that a person such as Buford Furrow may be dangerous and violent when armed with a firearm that they have declared him incompetent to purchase and possess them. His violent acts when so armed therefore can hardly be characterized as "unexpected."

At the time of his assault on the JCC, Furrow is believed to have had an arsenal of firearms in his possession. Record 13-14, ¶ 23. His firearms included at least the following: Glock's model 26, a 9 mm handgun; Norinco's model 320, a 9 mm illegally shortened rifle; a Maadi model RML, 17.62 caliber automatic rifle; a Bushmaster model XM15-E25, a .223 caliber rifle; two Imbel model L1A1, a .308 caliber rifle; and a Davis Industries' model D-22, a .22 caliber handgun. Record 13-14, ¶ 23.

Furrow entered the JCC and shot and injured three very young children, one teenager, and one adult. Two of the children shot are plaintiffs Joshua Stepakoff and Benjamin Kadish, both campers at the JCC at the time. Joshua, six years old at the time of the shooting, was shot in his left lower leg and his left hip, fracturing or breaking a bone. Benjamin, five at the time, was shot in the buttocks and in his left leg, fracturing his left femur, severing an artery, and causing major internal injuries. Plaintiff Mindy Finkelstein, a sixteen-year-old camp counselor at the time of the shooting, was shot twice in her right leg. These plaintiffs suffered severe, life-threatening bodily injuries, emotional distress, and permanent residual harm. Plaintiff Nathan Powers, then four years old, was not hit with a bullet but was present at the JCC during the shootings, and suffered

and continues to suffer severe emotional distress. Record 14, ¶ 24-25.

Furrow fled the JCC with his weapons. Later that day, he saw Joseph Ileto, an employee of the U.S. Postal Service in the midst of his mail route in Chatsworth, California. Furrow shot and killed Mr. Ileto. The FAC alleges on information and belief that Mr. Ileto was shot with the Glock model 26. Record 39, ¶ 148.

At the time of these shootings, Furrow was prohibited under federal and California law from possessing, purchasing, or using any firearm, having been committed to a psychiatric hospital in 1998, and convicted of assault in the second degree on May 21, 1999, in Washington State. Record 14, ¶ 28.

The FAC additionally alleges how the crime gun tracing system established by the federal government has put Norinco on notice of the large number of its firearms that are traced as part of a criminal investigation. Record 22-23, ¶ 63-64. As a result of the information available through the crime gun tracing system, Norinco knows or reasonably should know that certain of its distribution choices result in a disproportionately high number of traced crime guns. Record 22, ¶ 62. Instead of addressing these high risk distribution channels, Norinco exploits them, as the crime gun trace data demonstrates, even though Norinco knows or reasonably should know that by exploiting them, Norinco is creating, assisting in creating, and maintaining the illegal firearms market, the principal market through which prohibited persons obtain firearms. Record 22, ¶ 61; Record 23, ¶ 66; Record 32, ¶ 104-105.

The specific distribution practices by Norinco that facilitate widespread accessibility of its firearms to prohibited persons such as Furrow include but are not limited to the following practices alleged in the FAC:

a. Norinco does not limit, or require its distributors and dealers to limit, the number, purpose, or frequency of firearm purchases, despite its knowledge that a number of jurisdictions, including California, prohibit such

multiple sales of handguns and that ATF crime gun data establishes a correlation between multiple sales and guns traced to crime. Norinco chooses not to monitor or supervise its distributors or dealers to guard against practices or policies that facilitate access to firearms for criminal purposes. It purposely avoids any "vertical integration" as a technique for disassociating itself from downstream distribution, while offering monetary incentives for "high volume" sales. It chooses not to use techniques for controlling inventory and monitoring the distribution of its products that are commonplace in other industries selling their products in this country. Record 18-19, ¶ 44; Record 24-25, ¶ 71-75.

b. Norinco repeatedly uses disreputable distribution channels, such as corrupt dealers, that regularly provide guns to criminals and underage users, as defendants know from crime gun traces performed by the United States Bureau of Alcohol, Tobacco, and Firearms. Record 15-16, ¶ 32.

c. Norinco produces, markets, distributes, and sells far more firearms than it reasonably expects to be bought by law-abiding purchasers, intending to create, foster, and profit from the criminal firearms market. It deliberately oversupplies markets in jurisdictions with lax gun laws that are close to or neighbor jurisdictions with strict gun laws. Record 15, ¶ 31.

d. Norinco uses contracts with its distributors and dealers that do not provide sanctions for conduct that may enable criminals to obtain guns, though these same contracts contain express provisions designed to protect Norinco's revenues. Record 16-17, ¶ 34.

e. Norinco fails to take even minimal steps readily available to them that would eliminate widespread accessibility of firearms to prohibited persons. Record 23-24, ¶ 66.

Norinco knows or should know that the act of supplying a prohibited person with a firearm creates an unreasonable risk of harm to members of the public, and especially those members of the public such as plaintiffs who may be particularly vulnerable because of their ethnic or religious backgrounds. Record 33, ¶ 108. The FAC further alleges that ATF crime gun trace data reveals that guns manufactured by Norinco were among the top ten guns most frequently traced to crime in the Los Angeles area. Record 26, ¶ 81.

In addition, the FAC alleges that creation and maintenance of the illegal firearms market, which serves as the main supplier of firearms to prohibited persons, unreasonably interferes with the public health, the public safety, and the public peace. Record 35, ¶¶ 124-125. The level of firearms violence, including seemingly random violence, causes members of the public to fear to go out, to use public places, to leave their children at school. Record 36, ¶ 127. By facilitating the purchase and possession of firearms by individuals declared by law unfit to have them, Norinco substantially and unreasonably has interfered with the public's safety generally. These respondents (the child victims and surviving parent of murdered postal worker Joseph Ileto) have all suffered an injury different in kind from the general fear experienced by the public, because they have suffered the physical and mental injuries resulting from assault with a gun or gun shot wounds. Record 14, ¶¶ 24-26; Record 38, ¶ 138.

III. Proceedings Below

Respondents filed their original complaint in Los Angeles Superior Court on August 9, 2000, against defendants involved in the manufacture, marketing, and distribution of various firearms found in Buford Furrow's possession: Glock, Inc.; Glock GmbH; Petitioner China North Industries Corp. ("China North" or "Norinco"); Davis Industries; Republic Arms, Inc.; Jimmy L. Davis; Maadi; Bushmaster Firearms; Imbel; The Loaner Pawnshop Too; David McGee; and 150 Doe Defendants.

The initial complaint alleged seven causes of action. The first two claims were asserted by plaintiff Lilian Ileto,

against all defendants, for survival and wrongful death. The remaining claims were brought by all plaintiffs, against all defendants, for public nuisance, negligence, negligent entrustment, and unfair business practices. As originally filed, the complaint sought certification of a class, damages, and injunctive relief. Pet. App. A, 6a.

Defendants Loaner Pawnshop and David McGee successfully moved for dismissal for lack of personal jurisdiction. Pet. App. B 72a. Defendants Republic Arms, Inc. and Jimmy L. Davis answered. *Id.* The Superior Court, by the Honorable Anthony Mohr, granted demurrers filed by defendants Glock, Inc., and Bushmaster Firearms, Inc., and dismissed all claims with leave to amend. *Id.*

On May 23, 2001, plaintiffs filed their First Amended Complaint ("FAC"). The FAC retained plaintiff Ileto's survival and wrongful death claims, as well as all plaintiffs' negligence and public nuisance claims, and the prayer for damages. Plaintiffs did not reassert their other claims or prayers for relief. In particular, plaintiffs withdrew their class allegations and their requests for injunctive remedies, and defendants Loaner Pawnshop and McGee were no longer named in the FAC. Pet. App. A, 6a-7a. RSR Management Corporation and RSR Wholesale Guns Seattle, Inc. (collectively "RSR"), were named in place of two Doe defendants. *Id.*

On October 17, 2001, following compliance with the Hague Treaty, China North was served successfully with the original complaint. Pet. App. B, 73a. On November 14, 2001, China North removed the action to the court below under 28 U.S.C. § 1330 and 28 U.S.C. § 1603, on the ground that China North is an instrumentality of a foreign state. On December 6, 2001, the district court determined that removal was proper. *Id.*

The following defendants subsequently filed motions to dismiss under Fed. R. Civ. P. 12(b)(6): Republic Arms, Inc., Jimmy L. Davis, and Davis Industries (collectively "Davis"); Quality Parts Company and Bushmaster Firearms (collectively "Bushmaster"); RSR; Norinco; and Glock, Inc. The district court

granted those motions to dismiss on March 25, 2002, in a published memorandum order. Pet. App. A 14a. The district court granted the RSR motion on June 11, 2002, and directed the entry of final judgment in favor of all moving defendants pursuant to Fed. R. Civ. P. 54(b). *Id.* The order granting defendant Glock's motion to dismiss (with which all the other orders are substantially similar) is published at *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040 (C.D. Cal. 2002). Respondents timely filed their notice of appeal on July 10, 2002. Pet. App. B, 71a.

Following briefing and argument the Ninth Circuit issued its opinion reversing the district court's judgment granting the motions to dismiss. *Ileto v. Glock, Inc.*, 349 F.3d 1191 (9th Cir. 2003). Pet. App. A 1a.

Following issuance of the panel's opinion, Petitioner and defendants-appellees Glock, Inc. and RSR Management Corp. filed petitions for rehearing and rehearing en banc on December 17, 2003. All Petitions for rehearing were denied. Pet. App. C 111a. This Petition from China North followed. No other defendant has joined its Petition or petitioned independently for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. Summary Of Argument

After reviewing the applicable California statutes relevant to the negligence and public nuisance claims, as well as the numerous California cases applying those statutes, the Ninth Circuit correctly held that in the distribution of their products, firearms manufacturers and distributors are subject to Cal. Civ. Code § 1714(a) and Cal. Civ. Code §§ 3470, 3480. Accordingly, they may be held liable in negligence and pubic nuisance, under those statutes, if they engage in irresponsible distribution practices that knowingly facilitate criminal access to firearms, thereby contributing to widespread firearms violence, crime, personal injuries, and death.

In particular, and despite the alarm Petitioner seeks to raise, the opinion below sustaining these shooting victims' personal injury claims, at the pleading stage, poses no threat to responsible commerce in firearms or any other product. Respondents have

not raised, and the opinion below did not sustain, any strict liability claims, as Petitioner urges. Instead, under the Ninth Circuit's opinion, Respondents will be required to prove both that Petitioner's wrongful conduct was a substantial factor in causing their injuries and that Petitioner failed to exercise due care in its distribution practices, or that those practices caused unreasonable interference with the public health, safety or peace. In short, responsible participants in firearms commerce can shield themselves from liability to shooting victims through the simple exercise of reasonable care. That will pose no threat to federalism or to principles of international comity, or indeed to responsible commerce in handguns.

II. Petitioner Fails To Identify A Single Issue So Fundamental To Further Conduct Of The Case That This Court Should Depart From Its Well-Settled Rule Against Reviewing Interlocutory Judgments.

The judgment below is interlocutory and not final, and simply reverses a trial court judgment entered on an order granting motions to dismiss under Fed. R. Civ. P. 12(b)(6). This Court rarely grants certiorari to review interlocutory judgments. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993). As this Court has recognized, the fact that a party must proceed in litigation is not a ground for such review. *See Brotherhood of Locomotive Fireman v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967). Premature review may involve the Court in unnecessary constitutional adjudication and should therefore be avoided. *Justice Brennan, Some Thoughts on Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). Accordingly, as a general rule, this Court will not issue a writ of certiorari to review a decree of a circuit court on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the case. *American Construction Co. v. Jacksonville, T. & K. W. Railway Co.*, 148 U.S. 372, 384 (1893).

There is no such necessity here. Avoiding this issue, Petitioner fails to acknowledge that the judgment is interlocutory in nature, and substitutes hysterical accusations of arrogation

of legislative power by the judiciary for identification of any issue so fundamental to further conduct of the case that it must be resolved now. The Ninth Circuit decision merely allows the lawsuit to go forward on the pleadings, interpreting California law to allow the negligence and public nuisance claims against Petitioner to proceed on the facts pled. The California state court allowed substantially similar public nuisance claims by some California cities and counties to proceed past demurrer in *People v. Arcadia Machine & Tool, Inc.*, Judicial Council Coord. Proceeding No. 4095, Slip Op. (San Diego County Superior Court Sept. 19, 2000) (denying demurrers and finding complaints stated public nuisance claims against firearms manufacturers and distributors).[1]

Petitioner must distort California legislative policy and case law to manufacture its accusations of judicial activism by the Court below. For example, the California Supreme Court has rejected soundly the position that Petitioner now proffers as its opening argument (though it never raised the argument below) — viz., that Cal. Gov. Code § 53071 expresses the intent of the California Legislature to occupy the whole field of regulation of firearms. *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853, 861, 118 Cal. Rptr. 2d 746, 751 (2002). Exactly to the contrary, the California Supreme Court has held squarely that the California Legislature has *chosen not to occupy the entire field* of gun control but rather has *preempted only certain discrete areas of firearms regulation*. "A review of the gun law preemption cases indicates the Legislature has preempted discrete areas of gun regulation rather than the entire field of gun control. The seminal case to advance this proposition is *Galvan v. Superior Court* (1969), 70 Cal. 2d 851, 76 Cal. Rptr. 642, 452 P.2d 930. . . ." *See Great Western*, 27 Cal. 4th at 861. Under the controlling California cases, section 53071 is to be narrowly construed to preempt only those subfields of firearms

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1. In subsequent proceedings, the trial court granted summary judgment against most defendants. *People v. Arcadia Machine & Tool, Inc.*, 2003 WL 21184117 (2003). That judgment is on appeal.

regulation it specifically addresses — i.e., licensing and registration. For a review of the relevant case law, see *Great Western*, 70 Cal. 2d at 861-863, in which the court cites with approval to *Olsen v. McGillicuddy*, 15 Cal. App. 3d 897, 93 Cal. Rptr. 530 (1971). The *Olsen* court, in turn, notes that despite the opportunity to include an expression of intent to occupy the entire field of firearms regulation after *Galvan* narrowly construed the predecessor to Cal. Gov. Code § 53071, the Legislature declined to do so in subsequent enactments. *Id.*

Likewise, nothing supports Petitioner's extrapolation from their incorrect premise. None of the cases cited by Petitioner and no other California case holds that "occupation of the field" of gun control by the Legislature "bars any judicial action" other than interpretation of the existing statutes and regulations. The cases Petitioner relies on for this *alleged* premise all arise in the context of challenges to local ordinances regulating firearms, evaluating the extent of *state preemption of such local regulation*, and none stands for the cited proposition.

As shown above, in *Galvan v. Superior Court*, 70 Cal. 2d 851, the California Supreme Court emphasized the narrowness of state law firearms preemption, a principle reiterated in *Great Western*, *supra* (upholding a local ban on gun sales on County property), and in *Nordyke. v. King*, 27 Cal. 4th 875, 118 Cal. Rptr. 2d 761, 44 P.3d 133 (2002) (upholding a prohibition of firearms possession on county-owned property), and in *Cal. Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302, 78 Cal. Rptr. 2d 591 (1998) (upholding a local ban on dealer sales of "junk guns"). In the two other cases cited by Petitioner, *Sippel v. Nelder*, 24 Cal. App. 3d 173, 101 Cal. Rptr. 89 (1972), and *Doe v. City of San Francisco*, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1982), the local ordinance was held to be preempted by state law because it created a licensing or registration scheme, and thus conflicted with Cal. Gov. Code § 53071 or its predecessor Cal. Gov. Code § 9619, the state statute occupying the *subfields of licensing and registration* of

firearms. However, as noted above, in a number of cases, the courts have found local gun regulations to be valid in the face of challenges based on state law preemption claims. *See also Great Western*, 27 Cal. 4th at 861-63 (examining the cases upholding local firearms ordinances).

In *Sippel*, relied on by Petitioner, the court found the challenged ordinance conflicted with Cal. Gov. Code § 9619 (predecessor to section 53071) and Penal Code § 12026. The Court made the unremarkable observation in passing that while the record in the trial court suggested a critical need for the local ordinance, which required a person to obtain a local permit to possess a concealable weapon in his home, it was up to the Legislature to determine how to address that need. 24 Cal. App. 3d at 177. Nothing in *Sippel*, or any of the cases relied on by Petitioner, remotely suggests what Petitioner attempts to torture out of them — that is, that by enacting section 53071 (or any other statute), the California Legislature has thereby expressed its intent to exempt firearms manufacturers from all tort liability.[2]

In addition, Petitioner's strained interpretation of Cal. Civ. Code § 1714.4 as expressing the Legislature's intent to immunize Petitioner from the claims of the FAC was carefully considered and correctly rejected, not only by the Ninth Circuit, *but also by the district court itself. See Ileto v. Glock*, 194 F. Supp. 2d 1040, 1050-51 (C.D. Cal. 2002).

Prior to its repeal in 2002, the text of Cal. Civ. Code § 1714.4 (App. C) provided as follows:

a. In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of

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2. In fact, if that were the case, having enacted section 9619 in 1969 (the predecessor to section 53071) and subsequently amended and renumbered section 9619 as section 53071 in 1971, there would have been no need for the Legislature to enact Cal. Civ. Code § 1714.4 in 1983, immunizing firearms manufacturers from a specific class of civil lawsuits.

injury posed by its potential to cause serious injury, damage, or death when discharged.

b. For purposes of this section:
   1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.
   2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.

On its face, this was narrowly crafted language, purporting to bar only certain enumerated claims proceeding under specified theories. It prohibited only liability premised on allegations that firearms were "defective in design," and only where such defects were alleged "on the basis" that the firearms failed a risk/utility test because any benefits they might have conferred were outweighed by the weapons' general capacity to cause injury. The statute also provided that for "purposes of this section" — i.e., for cases *within the statute's scope* — a special legislative definition of causation applied.

The Ninth Circuit, like the district court, found section 1714.4 to be inapplicable, under its express terms, to claims like Respondents' — *i.e.*, to claims predicated *not* on the particular physical attributes of the relevant firearms, nor on any design defect, but rather on the failure to exercise reasonable care in their marketing and distribution. Pet. App. A, 18a-20a; *Ileto v. Glock*, 194 F. Supp. 2d at 1050-51. Statutory language conferring more sweeping immunity would have been easy to draft.[3] If no such language has every been found in the statute

3. Some other jurisdictions have, in fact, enacted provisions that manifest such intent. In Pennsylvania, for example, the legislature has explicitly enacted a flat ban on suits by municipalities against handgun manufacturers and distributors who market their products in accordance with applicable state and federal laws and regulations. The language of

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books in California, it is because the actual public policy underlying section 1714.4 was limited to the lawsuits it actually covered.

Similarly, Petitioner's argument that the holding in *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370 (2001), somehow bars these claims is misplaced, as the Ninth Circuit *and* the district court held. *Merrill* merely applied section 1714.4 to claims of exactly the sort that the statute then barred. Because the plaintiffs' claims in *Merrill* were predicated on the allegedly negligent design and physical attributes of the relevant weapons, the court held them to be defective design claims within the statute's meaning. *See* 26 Cal. 4th at 478-80. And since the plaintiffs in *Merrill* sought to impose liability in tort precisely because the dangerousness of the weapons, as designed, outweighed any social utility they might afford, the claims were indeed brought "on the basis" of the very theories that section 1714.4 proscribed. *See id.* at 480-81. In so ruling, the *Merrill* court took pains to distinguish other claims not within the statute's scope, including "far different" claims involving various forms of "negligent furnishing" – a category into which the claims in this civil action may readily be seen to fall. *See id.* at 483.

The Ninth Circuit was thus correct to distinguish *Merrill*. Unlike the claims in *Merrill*, Respondents' claims do not invoke design defect principles under the thin camouflage of a different legal label. These claims involve different legal and factual

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the Pennsylvania provision, captioned "No Right of Action," is not subtle, indirect, or coy:

> No political subdivision may bring or maintain an action at law or in equity against any firearms or ammunition manufacturer, trade association or dealer for damages, abatement, injunction relief or any other relief or remedy resulting from or relating to either the lawful design or manufacture of firearms or ammunition or the lawful marketing or sale of firearms or ammunition to the public.

18 Pa. C.S. § 6120(a)(A.1)(1).

elements, and a different underlying theory of tortious *distribution*.[4]

In response to the *Merrill* decision, the California Assembly and the California Senate passed S.B. 682, a bill repealing Cal. Civ. Code § 1714.4 in its entirety. Signed into law by Governor Davis on September 25, 2002, S.B. 682 also amended Cal. Civ. Code § 1714(a), to add additional language, shown in bold below:

> 1714.(a) Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care of skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. **The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section. The extent of liability in these cases is defined by the Title on Compensatory Relief.**

In short, the legislative response to the *Merrill* decision was to repeal altogether even the limited immunity formerly conferred by section 1714.4 on firearms manufacturers, and to confirm that the design, distribution, and marketing of firearms are activities to which the duty of ordinary care mandated by section 1714(a) applies.

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4. The physical characteristics of the Norinco 320 are *germane* to Respondents' claims only to the extent that properly functioning handguns propel bullets, at high velocity, when their triggers are pulled. But Respondents raise no contention that Petitioner should have designed the Norinco 320 so that no bullets were propelled. Nor did section 1714.4 ever purport to bar all claims to which the general physical capacity of handguns to cause harm was *relevant*. Any such theory would prove far too much. For example, it would bar even claims against retailers who sold handguns to purchasers who forthrightly announced their intention to use them to imminent murderous purpose.

Even if Petitioner's strained interpretations of former section 1714.4 and *Merrill* were correct — and they are not — a conflict between them and the Ninth Circuit's interpretations would not provide a basis for certiorari review under Rule 10(a), much less a reason for the extraordinary exercise of that review in the context of an interlocutory judgment. Twenty-four years ago, this Court *deleted* from its rules a criterion previously allowing for certiorari review where "a court of appeals has . . . decided an important state or territorial question in a way in conflict with applicable state or territorial law." *Compare* Sup. Ct. R. 19(1)(b) (1970) *with* Sup. Ct. R. 17.1 (1980) *and with* Sup. Ct. R. 10 (current). That deletion recognized this Court's practice of limiting its appellate review to *substantial questions of federal law. See, e.g., Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 525 U.S. 943, 943 (1998) (opinion of Stevens, J., on denial of certiorari) ("This Court does not normally make an independent examination of state law issues that have been resolved by a court of appeals."); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 181 n.11 (1979) ("it is not our practice to re-examine state law determinations of this kind").

Moreover, Petitioner cannot sustain its accusation that the Ninth Circuit so "tortured" and "blatantly nullified" Cal. Gov. Code § 53071, Cal. Civ. Code § 1714.4, or the *Merrill* case that certiorari review by this Court is merited on *any* basis. As shown above, contrary to Petitioner's claim, the California Supreme Court has held that Cal. Gov. Code § 53071 does *not* express the Legislature's intent to occupy the entire field of gun control. To the extent that section 53071 preempts local regulation of the limited subfields of licensing and registration of firearms, it is simply irrelevant here (nor has Petitioner ever raised it before). Further, it is plain that neither section 53071 nor any of the cases construing that statute support the proposition Petitioner urges, that is, that the California Legislature has expressed its intent to "bar any judicial action that does more than merely interpret the existing statutes and regulations." In short, Petitioner does not cite and cannot cite any California statute or

case law that precludes the state courts from applying Cal. Civ. Code § 1714(a) and common law tort principles regarding breach and causation, on a case by case basis, to actions of firearms manufacturers alleged to violate the duty of ordinary care mandated by Cal. Civ. Code § 1714(a).

With respect to the narrow immunity set forth in former section 1714.4, both the district court and the Ninth Circuit relied on the California Supreme Court's analysis of that statute in *Merrill v. Navegar* to conclude that section 1714.4 does not bar Respondents' claims. The Ninth Circuit denied rehearing en banc, with some judges dissenting. At the most, this divergence on how *Merrill* should be interpreted suggests that reasonable minds may differ on the interpretation of that case. Thus, unlike the lower court's decision in *Leavitt v. Jane L.*, 518 U.S. 137 (1996), the Ninth Circuit's reading of California law is not "plainly unsustainable" such that this Court's extraordinary review is merited, much less its review on certiorari of an interlocutory judgment. The mere fact that Petitioner claims the Ninth Circuit's reading of *Merrill* was erroneous provides no basis for certiorari review under Rule 10.

III. The Ninth Circuit Correctly Analyzed The State Law Issues Under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), And In Any Event, An Allegedly Erroneous Reading Of State Law Is Not A Ground For Certiorari Review By This Court.

Having concluded that there was no statutory bar under California law to Respondents' claims, the Ninth Circuit then engaged in a painstaking application of *Erie* principles to determine whether, on the facts alleged, Respondents' FAC stated claims for negligence and public nuisance under California law. In that analysis, the Ninth Circuit reviewed the relevant statutes and the controlling decisions interpreting those statutes, totalling almost two dozen cases.

As noted above, in their various arguments that the Ninth Circuit improperly created a new common law liability in California, both the Petitioner and the dissenting judges

misapprehend California negligence law. Under California law, to state a negligence claim, plaintiff must allege that defendant owed plaintiff a legal duty, that it breached that duty, and that the breach was a proximate cause of plaintiff's injuries. However, the question whether a legal duty is owed is governed by the "command" of Cal. Civ. Code § 1714(a), which declares that "*[e]very person* is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the *management of his property* or person." *See Merrill v. Navegar*, 26 Cal. 4th at 477.

The California Supreme Court has acknowledged that this code section states a civil law, and not a common law principle. *Rowland v. Christian*, 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 100 (1968). The California Supreme Court has further stated "it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Cal. Civ. Code, no such exception should be made unless clearly supported by public policy." *Id.; see also Merrill v. Navegar*, 26 Cal. 4th at 477. Thus, in California, the question is not under what circumstances a manufacturer of a product owes a legal duty to another, but rather under what statutory or judicially created exception, if any, a manufacturer may be excused from liability for breach of that duty when his want of ordinary care results or is a substantial factor in causing injury to another. *See Mitchell v. Gonzales*, 54 Cal. 3d 1041, 1 Cal. Rptr. 2d 913 (1991) (holding that under California law, the proximate cause of an injury is a cause which is a substantial factor in bringing about the injury).

Put another way, by enacting Cal. Civ. Code § 1714(a), the California Legislature has already determined as a matter of public policy that a product manufacturer is generally under a duty of ordinary care. Therefore, as a federal court sitting in diversity and deciding an issue of state law, the Ninth Circuit was required by Cal. Civ. Code § 1714(a) to impose that duty of ordinary care on Petitioner absent an applicable statutory exception or a finding that a departure from the statute's mandate was clearly supported by public policy. *See Merrill, supra*.

In short, the threshold issue before the Ninth Circuit on the negligence claim, that is whether California law imposes a duty of care on a firearms manufacturer, is not a question left to the evolution of common law in California because it has already been answered by the Legislature. Petitioner and the dissenting judges thus turn California law upside down when they assert that the Ninth Circuit violated federalism principles by reaching out to create a "new common law liability" rather than certify the state law negligence claim to the California Supreme Court or abstain from deciding it.

The Ninth Circuit rightly concluded, based on the plain language of the statute and *Merrill v. Navegar* (controlling California Supreme Court authority), that the statutory exception set forth at Cal. Civ. Code § 1714.4 did not apply to Respondents' claims. Accordingly, the court went on to determine whether a departure from Cal. Civ. Code § 1714(a) was clearly supported by public policy, as it was required to do under controlling California Supreme Court authority. As the Ninth Circuit correctly held, departure from the fundamental principle set forth at section 1714(a) involves the balancing of a number of considerations, the major ones being the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of connection between defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, the policy of preventing future harm, the consequences to the community of imposing a duty to exercise due care with liability for breach, and the availability, cost and prevalence of insurance for the risk involved. *Rowland*, 69 Cal. 2d at 112-13; *see also Merrill*, *supra*. Based on the required balancing of these factors, the Ninth Circuit concluded public policy did not require that Petitioner be immunized from liability for breach of its duty of ordinary care to Respondents. Pet. App. at 27a-29a, 50a-51a.

By urging certification or abstention on the theory that the Ninth Circuit should not have engaged in the foregoing policy analysis, Petitioner and some of the dissenting judges also

misconstrue the role of public policy in resolving Respondents' state law negligence claim. Faced with a demurrer to the FAC, and taking the allegations of the complaint as true, a California court would have balanced the various factors set forth above not to determine whether the court should impose a legal duty on Petitioner with respect to Respondents in the first instance, but rather to determine whether these factors *clearly* weigh in favor of relieving Petitioner from that duty. As a federal court sitting in diversity, the Ninth Circuit was required to apply the controlling statute, Cal. Civ. Code § 1714(a), and therefore to conduct the foregoing public policy analysis. Had the Ninth Circuit ignored section 1714(a), it would then perhaps have been engaging in judicial activism. Yet that is precisely the course Petitioner and the dissenting judges urge when they theorize, incorrectly, that in California, the question of whether a product manufacturer may ever be held to a duty of care in how it distributes its product is a question of common law which the courts of California have never addressed and that therefore the Ninth Circuit should not have addressed it. Because Petitioner relies exclusively on the foregoing misplaced "federalism" theory, Petitioner fails to discuss, or analyze, or distinguish, any of the case law relied on by the Ninth Circuit in concluding that the FAC also alleges facts sufficient to establish breach and causation under California law.

With respect to Respondents' public nuisance claim, Petitioner also fails to support its accusation that the Ninth Circuit improperly extended California public nuisance law. Petitioner's contention that claims for public nuisance must have some nexus with real or personal property rights is contrary to hornbook law. That incorrect contention was also one of the grounds for Petitioner's rejected petition for rehearing and rehearing en banc, and is an artificial construct based on twelve words in a case involving a private nuisance claim, taken out of context. Here again, Petitioner's position is at loggerheads with plain statutory language.

Under Cal. Civ. Code § 3479, a *nuisance* is defined as follows:

> *Anything* which is injurious to health, including, but not limited to, the illegal sale of controlled substances, *or* is indecent or offensive to the senses, *or* an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, *or* unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Id. (emphasis added). Under Cal. Civ. Code § 3480, in turn, a public nuisance is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons." The widespread unlawful possession of handguns by criminals and youth, which Petitioner's negligent distribution practices facilitate, easily satisfies both definitions. It likewise satisfies the traditional standards for public nuisance outlined in RESTATEMENT (SECOND) OF TORTS § 821B, to which the California Supreme Court looks for guidance. *See People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1104, 60 Cal. Rptr. 2d 277, 285 (1997) (any unreasonable interference with "five general categories of 'public rights': . . . the public health, the public safety, the public peace, the public comfort or the public convenience"), *cert. denied*, 521 U.S. 1121 (1997). Nothing in these long-settled California standards has ever been supposed to immunize defendants from public nuisance liability merely because the sale of some product is involved, or to require some nexus with plaintiffs' real or personal property.

Petitioner's argument to the contrary proceeds by conflating the tort of private nuisance, on the one hand, with the different and separate tort of public nuisance, on the other. To see how, it is helpful to look more closely at the primary authority on which Petitioner relies — a twelve-word quote fragment from the California Court of Appeals decision in *City of San Diego v. United States Gypsum Co.*, 30 Cal. App. 4th 575, 586, 35 Cal. Rptr. 2d 876, 883 (1994).

City of San Diego involved claims against asbestos manufacturers arising from the health hazards posed by asbestos products installed in city buildings. Among the theories of liability addressed in the opinion was the city's claim for "nuisance." Although the opinion nowhere states explicitly that the claims were for "private" nuisance, the court's entire analysis is addressed to private nuisance concepts and invokes private nuisance authorities. For example, the opinion cites California's general nuisance statute, Cal. Civ. Code § 3479, but not the public nuisance statute, Cal. Civ. Code § 3480. Moreover, the opinion characterizes the gravamen of the city's claim as involving interference with the enjoyment of property, 30 Cal. App. 4th at 584-85, echoing the classic language with which the California courts, like courts everywhere, have long defined private nuisance claims. *See, e.g., San Diego Gas & Electric Co. v. Superior Court*, 13 Cal. 4th 893, 937, 55 Cal. Rptr. 2d 724, 751 (1996) ("interference with the private use and enjoyment of land").

It is in this overall context of private nuisance that the court in *City of San Diego* inscribed the twelve words on which Petitioner relies, and whose ambiguity Petitioner seeks again to exploit: "[N]uisance cases 'universally' concern the use or condition of property, not products." 30 Cal. App. 4th at 586 (citation omitted).

As the Ninth Circuit opinion properly notes, these twelve words are actually part of a larger sentence, in which the state appellate court is making passing reference to what the Michigan Court of Appeals "noted" in *Detroit Board of Educ. v. Celotex Corp.*, 196 Mich. App. 694, 711, 493 N.W.2d 513, 521 (1992), *appeal denied*, 444 Mich. 908, 512 N.W.2d 318 (1993). Pet. App. A, 47a at footnote 2. As it turns out, the *City of San Diego* court's citation to *Detroit Board of Education* affirmatively confirms that the twelve words quoted in the Petition refer to *private* nuisance claims. The Michigan decision involved a similar attempt to recast product liability claims involving asbestos as claims for *private* nuisance (a point on which the

Michigan court *was* explicit, *see* 493 N.W.2d at 520), and it is in that context of private nuisance that the Michigan court observed: "The law of nuisance is fraught with conditional rules and exceptions that turn on the facts of individual cases, and the cases almost universally concern the use or condition of property, not products." *Id.* at 521.

It is settled, and no one disputes, that claims for *private* nuisance generally involve "interference with the private use and enjoyment of land." *San Diego Gas & Electric Co.*, 13 Cal. 4th at 937. No such requirement applies, however, to claims for *public* nuisance. That distinction is a matter of longstanding black-letter law, and cannot be undone by the artifice of locating judicial quotations that drop the modifier "private" in unguarded moments. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 821A-821E (setting forth the respective elements of private nuisance and public nuisance). Because the claims asserted here are *public* nuisance claims, *City of San Diego* is simply inapposite. Indeed, in *Selma Pressure Treating Co. v. Osmose Wood Preserving, Co.*, 221 Cal. App. 3d 1601, 1619 n.7, 271 Cal. Rptr. 596, 607 n.7 (1990), the court explicitly rejected the view that any rule of law generally relieves the manufacturers of products from public nuisance liability. Petitioner also adduces no sound policy reason to create some new exemption from public nuisance liability, unknown at common law, for tortfeasors who manage to sell products at a profit in the course of endangering the public health, safety, and peace.

Finally, with respect to certification or abstention, Petitioner has in effect waived any argument that the Ninth Circuit should have invoked either procedure. Not only is it Petitioner who removed this lawsuit from state court to federal court (as it was entitled but not required to do under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330), but in addition, Petitioner never moved for certification or abstention in either the district court or the Ninth Circuit.[5] Nor did Petitioner ever complain

5. Furthermore, with respect to certification, the California Supreme Court is *not required* to accept a certified question. *See* Cal. Rules of Court, Rule 29.5(f).

that the district court should not have adjudicated whether the FAC stated claims in negligence or public nuisance under California law — issues the district court did in fact adjudicate, albeit in a manner more to Petitioner's liking. If Respondents' negligence and public nuisance claims raised novel, unsettled questions of state law, as Petitioner now alleges, then presumably the federal district court was as inappropriate a forum for their adjudication as the Ninth Circuit, but Petitioner never sought certification in the trial court. Finally, Petitioner never mentioned certification or abstention in any of its briefing in the Ninth Circuit.

As shown above, Petitioner's accusations of judicial activism are unsupported except by gross distortions of California statutory and case law and the opinion below. Further, contrary to Petitioner's dire warnings of forum shopping, this case also does not present any looming crisis of disparate results between California state courts and the federal district courts, sitting in diversity. That theoretical possibility might once have existed, if *Merrill v. Navegar* had indeed held that handgun manufacturers enjoyed a blanket immunity from claims in tort under California law. But *Merrill* did not so hold, and *even if it had*, any hypothetical prospect of litigants fleeing the state court system in favor of California's federal district courts has been decisively obviated by the California Legislature's *repeal* of the statute on which the holding in *Merrill* was based, *see Ileto v. Glock, Inc.*, 349 F.3d 1191, 1202 n.12 (9th Cir. 2003), and the state Legislature's simultaneous confirmation that firearms manufacturers are subject to the same fundamental duty of care that the law imposes on other persons. *See id.*, 349 F.3d at 1203 n.14. Thus, even if plaintiffs who sue firearms manufacturers formerly had some incentive to flee to federal court to avoid disadvantageous rules of decision that would have governed in California's courts, any such incentive has been eliminated by the Legislature's repeal and repudiation of those arguably disadvantageous provisions.

IV. The Ninth Circuit Correctly Held That a Tort Suit Seeking Compensatory Damages Against a Product Manufacturer Does Not Offend the Commerce Clause.

This Court has long made clear that a person who sets in motion in one state the means by which injury is inflicted in another state may be held liable for that injury according to the law of the latter state for injurious consequences within it. *Young v. Masci*, 289 U.S. 253, 258-60 (1933). In the FAC, Respondents are not seeking to have any of Petitioner's commercial activities enjoined. They are asking that a trier of fact award damages for the consequences of conduct by Petitioner that increased the risk of harm they suffered and was a substantial factor in causing that harm. In short, Petitioner's out-of-state conduct (as well as its in-state conduct) is alleged to have had injurious effects in California, to these Respondents. As this Court made clear in *BMW of N. Am. v. Gore*, 517 U.S. 559, 572-73 (1996), the incidental extraterritorial effects of tort liability do not offend the Constitution unless the conduct occurring outside the state for which compensation is sought (1) had no impact on the state or its residents or (2) was exercised to deter the defendant's conduct in another state, and to protect citizens in other states, rather than to protect the state's own citizens. *Id.*

Thus, while Petitioner cites to that part of the *BMW* decision acknowledging that the Constitution may impose limits on all forms of state law, Petitioner disregards the fact that in *BMW* this Court rejected a rule which would prohibit exercise of state power outside the state regardless of whether that conduct has effects within the state. This Court has never held that a state may not impose economic consequences through damage verdicts on violators of its laws for conduct occurring exclusively in another state. In fact, the Court in *BMW* recognized that a civil suit may proceed even though the result may be to create an incentive for change in out-of-state practices. What the Constitution bars is an economic sanction penalizing conduct that had no effect on the state or the residents of the state in which the trier of fact sits, or where the intent of the sanction

was to punish the out-of-state conduct for the sake of protecting out-of-state victims, rather than to protect and compensate the state's own residents for the injuries they suffer.

The Ninth Circuit correctly held that in this lawsuit, the state's interest in protecting the health and safety of its residents is a legitimate interest as the basis for any extraterritorial exercise of its power through a trial verdict. This lawsuit is well within the type of state law exercise which this Court found permissible in *BMW*.

Petitioner's argument that the Commerce Clause is implicated because Congress intends federal law to be the sole source of regulation of firearms commerce is equally flawed. Before a court finds Congress has "preempted" any subject matter, it must be absolutely certain Congress intended to preempt that field of regulation. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). There is a strong presumption against federal preemption of state and local legislation. *California v. ARC American Corp.*, 490 U.S. 93, 101 (1989). This presumption is especially strong in areas traditionally occupied by the states, such as health and safety measures. *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). To find preemption a court must find an express statement by Congress of intent to preempt, or a pervasive scheme of federal regulation that leaves no room for state or local regulation, or an *actual* conflict between federal law and the challenged statute or law. *English*, 496 U.S. at 73.

In enacting the Gun Control Act of 1968 and the Firearms Owners' Protection Act, Congress never expressed congressional intent to preempt state regulation of firearms. In fact, Congress expressly disavowed any intent to occupy the field of gun control when it enacted the Gun Control Act. *See* H.R. Rep. No. 1577, 90th Cong. 2d Sess. (1968), *reprinted in* 1968 U.S.C.A.N. 4410, 4411. Moreover, the Gun Control Act specifically acknowledges the existence of state and local laws regulating federal firearms licensees and requires licensees to comply with the state and local laws. 18 U.S.C. § 922 (b)(2)-(3). The federal courts have noted, in various challenges to state and local laws, that Congress has *nowhere* expressed an intent to exclude state and local

regulation of firearms. *See Richmond Boro Gun Club v. City of New York*, 896 F. Supp. 276, 285-88 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681 (2d Cir. 1996); *see also Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

In addition, even assuming *arguendo* that this lawsuit is an exercise of state power, and may affect Petitioner's distributional practices, no federal law positively authorizes these practices, and thus there is no actual conflict and no frustration of congressional purpose. *See Richmond Boro Gun Club v. City of New York*, 97 F.3d 681 at 687.

Petitioner's argument that the Ninth Circuit decision will result in piecemeal regulation and thus undermine uniformity intended by Congress in regulating firearms also fails. It fails first because, as shown above, Congress has never expressed an intent to occupy the whole field of firearms regulation, to the exclusion of the states, and further the distributional practices alleged in this lawsuit are not authorized by Congress. Second, this lawsuit seeks compensation for those practices which Respondents show at trial are negligent or create or contribute to the public nuisance alleged. It is up to Petitioner to determine how or if to conduct its business in some other manner if compensation is awarded. While it is true that *among the many distribution practices* the FAC describes is Petitioner's intentional oversupply of markets in states with lax laws, that practice is reached by this lawsuit only if Respondents prove it is a negligent practice that was a substantial factor in their injuries or is a practice that contributes to and maintains the public nuisance alleged, and Petitioner then decides to modify that practice rather than pay compensatory damages when harm results.

The remainder of Petitioner's "the sky is falling" arguments are equally without merit. While acknowledging that the principal goal of the federal firearms laws is to keep firearms out of the hands of those not legally entitled to have them, Petitioner in effect argues that it should not be subject to any civil liability if it chooses, intentionally, to conduct

its business through various strategies designed to undermine rather than support that goal, merely because no regulation or statute prohibits those strategies. However, illegal acts are not necessary conditions for tort liability. Should some costs associated with those practices be shifted to Petitioner through an award of compensation, Petitioner may simply absorb them as a cost of continuing to do business through strategies that undermine, rather than further, the legislative goal of keeping firearms out of the hands of those incompetent to possess or purchase them, such as Buford Furrow.

CONCLUSION

For the reasons given, Respondents respectfully request that the honorable members of this Court deny the instant Petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

CAL. CIV. CODE § 1714

(AS AMENDED EFFECTIVE JANUARY 1, 2004)

RESPONSIBILITY FOR WILLFUL ACTS AND NEGLIGENCE; CONTRIBUTORY NEGLIGENCE

(a) Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. The design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section. The extent of liability in these cases is defined by the Title on Compensatory Relief.

(b) It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (1971) 5 Cal.3d 153, Bernhard v. Harrah's Club (1976) 16 Cal.3d 313, and Coulter v. Superior Court (1978) 21 Cal.3d 144 and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

Appendix A

(c) No social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of those beverages.

APPENDIX B

CAL. CIV. CODE § 1714 (PRIOR TO AMENDMENT)

RESPONSIBILITY FOR WILLFUL ACTS AND NEGLIGENCE; CONTRIBUTORY NEGLIGENCE

(a) Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the Title on Compensatory Relief.

(b) It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (5 Cal.3d 153), Bernhard v. Harrah's Club (16 Cal.3d 313), and Coulter v. Superior Court (___ Cal.3d ___) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

(c) No social host who furnishes alcoholic beverages to any person shall be held legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

APPENDIX C

CAL. CIV. CODE § 1714.4 (PRE-REPEAL)

PRODUCTS LIABILITY; DEFECTIVENESS OF FIREARMS OR AMMUNITION

(a) In a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged.

(b) For purposes of this section:

(1) The potential of a firearm or ammunition to cause serious injury, damage, or death when discharged does not make the product defective in design.

(2) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its potential to cause serious injury, damage, or death, but are proximately caused by the actual discharge of the product.

(c) This section shall not affect a products liability cause of action based upon the improper selection of design alternatives.

(d) This section is declaratory of existing law.

APPENDIX D

CAL. CIV. CODE § 3479

NUISANCE DEFINED

Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

APPENDIX E

CAL. CIV. CODE § 3480

PUBLIC NUISANCE

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.